

Prepared Statement  
of  
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On Behalf  
of the  
U.S. Chamber of Commerce

Before  
Financial Institutions and Consumer Credit Subcommittee  
of the  
Financial Services Committee  
United States House of Representatives

June 17, 2003  
10:00 AM Hearing on  
“The Role of the Fair Credit Reporting Act in Employee Background Checks and  
the Collection of Medical Information”

Good morning Mr. Chairman and distinguished members of the Subcommittee.

Thank you for asking me to testify before you today.

My name is Christopher Reynolds and I am a partner with the law firm of Morgan, Lewis and Bockius, which serves on the United States Chamber of Commerce Labor Relations Committee. I am here to testify on behalf of the Chamber about the Fair Credit Reporting Act's (FCRA) effect on employee background checks and employer investigations into workplace misconduct.

The Chamber has asked me to speak here today because, as part of my law practice, I frequently conduct sensitive and confidential investigations into potential workplace misconduct and advise clients with regard to legal issues related to those investigations and employee background checks, including issues involving FCRA. More generally, my law practice involves representing employers in discrimination and other employment-related litigation and counseling employers on a broad range of matters, including discrimination, equal employment opportunity, global workplace diversity, regulatory compliance and workforce restructuring. I also regularly speak on such matters and have authored a handbook entitled "The Prevention and Investigation of Sexual Harassment Claims," as well as several white papers on related topics. In addition, I am a member of the American Bar Association's Labor Section Equal Employment Opportunity Committee, a former co-chair of that organization's National Institute on Sexual Harassment, a member of the Legal Division of the Securities Industry Association and a member of the Advisory Board of Regulatory DataCorp (RDC).<sup>1</sup>

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<sup>1</sup> Launched July 16th, 2002, Regulatory DataCorp, Int'l. LLC ("RDC") was formed for the purpose of aggregating and leveraging public information and regulatory and industry expertise on a global basis to

My understanding is that today's hearing is one of several scheduled to address various issues that may become part of the debate surrounding reauthorization of FCRA's uniform standards provisions. Before addressing the issues specific to today's hearing, the Chamber would like me to stress that reauthorization of these provisions is of *vital* importance to its members, and the entire economy. As you know, FCRA's uniform standards fostered the growth of the national credit system we enjoy today. This credit system has helped facilitate the creation of our whole consumer credit economy, from the miracle of instant credit to the ubiquitous availability of credit cards.

Failure to reauthorize the uniform standards could result in the collapse of this credit system that has become so vital to our economy. In its place, we would have multiple and conflicting state credit rules, creating a complex and costly web of regulation that would confuse and confound both consumers and lenders alike. This could limit the availability of instant credit, and make it more difficult and expensive for consumers to obtain credit for everything from home loans to student loans.

Credit availability is also vital to small businesses, which often rely on access to credit to start new businesses or tied them over during lean times. Thus, a failure to reauthorize could not only jeopardize our consumer economy, but could also stymie the economy's ability to create new jobs through small businesses.

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enable clients to better identify and manage legal, regulatory and reputational risks and comply with global regulatory responsibilities. RDC has created a worldwide clearinghouse of public information that conforms to international standards and regulations, and tools necessary for clients to conduct automated due diligence on entities, individuals and transactions on a wholesale, cost-effective and timely basis. RDC's services are designed to help clients identify and manage serious threats posed to global security by money laundering, fraud, corruption, terrorism, organized crime, and other suspicious financial activities.

Reauthorization, however, is not the Chamber's only concern with FCRA. The issue before you today – the effect of FCRA on background checks and workplace investigations – also is of the utmost concern to Chamber members.

Both background checks and workplace investigations play a key role in employer efforts to protect employees, customers, stockholders and the public at large from workplace violence, harassment, financial misdeeds and other dangerous and unlawful acts. While FCRA does not affect every background check or investigation, it does affect many. Specifically, when employers hire experienced and objective third parties to conduct background checks and workplace investigations, as is often practical or necessary for them to do, the background check, and arguably the workplace investigation, must comply with FCRA's numerous notice and disclosure requirements. This is the case even though the check or investigation may have nothing to do with the individual's credit or credit worthiness.

Because FCRA affects background checks and investigations into workplace misconduct differently, I will address each issue separately.

### **Background Checks**

Our primary concern with regard to background checks is not with existing law, but rather that, as part of the reauthorization effort, new provisions will be added to FCRA that could adversely affect employers' ability to obtain reliable job-related background information on applicants or current employees.

As I will explain in greater detail, background checks are an essential employment-screening tool and, increasingly, both the public and the government are demanding that employers expand use of background checks to enhance workplace

security. While the Chamber recognizes that – particularly at this time – it is crucial that security needs be balanced with individual rights, FCRA and other federal laws already provide protections to ensure privacy, accurate reporting and fair use of background checks. Consequently, the Chamber strongly urges you to resist adding provisions that would hamper employers from obtaining reliable, relevant, and job-related background information on applicants and employees. In fact, if you are to make any changes to FCRA that would impact background checks, we recommend it be one that removes impediments FCRA poses to obtaining background checks on contract workers.

### ***Background Checks and Workplace Security***

Employers use information gathered from background checks to help screen out individuals who may pose a danger to the workplace or who may be inappropriate for certain jobs. For example, an employer may not want to hire an individual who has multiple recent drunk driving convictions as a school bus driver, or a person with a history of embezzlement as a bookkeeper.

A typical background check contains a review of an individual's criminal history, and sometimes other information pertinent to employment, such as verification of educational or professional credentials or prior work history. For certain positions, such as one where the individual will be responsible for large sums of money, the background check may also include a review of the candidate's credit history.

Available evidence suggests that background checks are effective at revealing information relevant to employment eligibility that the employer may not find elsewhere. For example, Avert, Inc., an Internet-based screening company, found that at least 24 percent of the 1.8 million applicants it screened in 2000 submitted information that was

misleading or negative and 6 percent of the background checks revealed a criminal history.<sup>2</sup> Similarly, in 1998, the Society for Human Resource Management (SHRM) released survey results showing that 45 percent of the employers that conducted background checks at one point or another found an applicant had lied about criminal records.<sup>3</sup>

In addition, at least with regard to criminal activity, statistics show that past criminal behavior can be predictive of future criminal behavior. In 2002 the Bureau of Justice Statistics reported on prisoners released in 1994. The report revealed that 81.4 percent of the prisoners had convictions prior to the one for which they had just served time and, within three years of release, 46.9 percent were convicted of a new offense.<sup>4</sup>

Anecdotal evidence demonstrating the importance of background checks is also readily available. While there are many examples, the case of Ernesto Forero-Orjuela is particularly interesting. Authorities suspected that Forero-Orjuela was a high-level figure in one of the world's largest drug cartels, and Maryland had charged him with the 1991 murder of a Baltimore businessman.<sup>5</sup> He had eluded federal authorities, however, for six years, until he was fingerprinted and had a background check as part of his employment application at Merrill Lynch.<sup>6</sup>

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<sup>2</sup> *Company Finds Plenty of Bogus Info in Job Apps*, Business & Legal Reports (June 12, 2001), retrieved from <http://hr.blr.com/elert.cfm?id=362>.

<sup>3</sup> Survey is available at <http://www.shrm.org/surveys/default.asp?page=available.htm>.

<sup>4</sup> Patrick A. Langan and David Levin, *Recidivism of Prisoners Released in 1994*, Bureau of Justice Statistics, Special Report at 2 (June 2002).

<sup>5</sup> Michael James, *Cartel trial could hit Md.; Drug ring suspect awaits extradition on murder charge; 1991 victim from Bel Air; Columbian man's job played a role in his New Jersey arrest*, Baltimore Sun, (Jan. 29, 2000).

<sup>6</sup> *Id.*

### ***The Public and the Government Demand Increased Use of Background Checks***

Since the tragic events of September 11, growing concerns over workplace security have fueled an increased public and government demand for use of background checks as an employment-screening tool. In fact, last year, Harris Interactive reported that, according to a recent poll, 53 percent of employees want employers to conduct more detailed background checks.<sup>7</sup> Other studies have yielded similar results.<sup>8</sup>

As for the government, in this session alone, Congress has introduced at least twenty-one different bills requiring background checks for employees that perform specific jobs or work in a specific industry (a list of these bills is attached to this testimony). Some of these bills are driven by national security concerns, such as H.R. 1407 which requires background checks for locksmiths working in judicial or executive branch facilities, or S. 157 which requires background checks for certain employees working in the chemical industry. Others, such as H.R. 439, which requires background checks for workers entering people's homes, or H.R. 1855, which requires background checks for certain health care providers, are aimed at protecting individuals from fraud, theft, violence and other crimes.

The 107<sup>th</sup> Congress was also active with regard to background check legislation, enacting several laws requiring backgrounds checks for certain airline, port and other transportation workers.<sup>9</sup>

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<sup>7</sup> Harris Interactive, *Privacy and Security: The Mind and Mood of U.S. Employees and Managers* (May 14, 2002).

<sup>8</sup> Bureau of Justice Statistics, *Public Attitudes Toward Uses of Criminal History Information* 32 (July 2001) (NCJ 187663).

<sup>9</sup> Maritime Transportation Security Act of 2002, the USA PATRIOT Act and the Aviation Transportation Security Act.

Many states also have enacted their own laws requiring employers in childcare, or similar industries, to conduct background checks on prospective employees.<sup>10</sup> Even where there are no explicit requirements to conduct a background check, some states implicitly encourage employers to conduct background checks by permitting negligent hiring suits. In these suits, courts may hold an employer liable for an employee's tortious actions, if the employer did not meet a certain standard of care in selecting the employee, including failing to conduct a background check or not conducting the background check thoroughly.

It is clear from these legislative efforts that many in Congress, as well as those in the state legislative bodies and courts, endorse greater use of employee background checks as a tool for increasing safety and security.

### ***Current Regulation of Background Checks Balances Security Needs and Individual Rights***

#### **FCRA**

FCRA defines “consumer report” as any written or oral communication by a consumer reporting agency (CRA) which bears on a person's creditworthiness, character, general reputation, personal characteristics, or mode of living, if the communication is used or collected in order to determine eligibility for, among other things, employment.<sup>11</sup> Under the statute, a CRA is any organization that regularly assembles consumer reports for a fee.<sup>12</sup> According to both the courts and the Federal Trade Commission (FTC), the

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<sup>10</sup> See, e.g., ALA. CODE § 16-22A-5

<sup>11</sup> 15 U.S.C. § 1681a.

<sup>12</sup> *Id.*

agency that enforces FCRA, a criminal background check on prospective or existing employees constitutes a consumer report when it is conducted by a CRA.<sup>13</sup>

Thus, if an employer hires an organization that regularly conducts background checks, such as a private investigator or a company like Choicepoint, the background check falls within FCRA's purview.

Background checks performed by the employer, or by outside organizations that are not CRAs, however, are not regulated by FCRA.<sup>14</sup> Also excluded from FCRA's requirement are "any report[s] containing information solely as to the transactions or experiences between the consumer and the person making the report[s]."<sup>15</sup> For example, if an employer uses an outside organization to conduct drug or psychological testing on a candidate, the test results are not a consumer report because the information is based on transactions or experiences between the candidate and the testing agency.<sup>16</sup>

Despite these exceptions, it appears most of the background checks performed every year are regulated by FCRA,<sup>17</sup> primarily because most employers find it more cost effective to outsource background checks to CRAs.

For covered background checks, FCRA imposes certain requirements on the employer and the CRA to ensure privacy and accurate reporting. Specifically, the employer must notify the employee or applicant and obtain his or her consent before

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<sup>13</sup> See *Lewis v. Ohio Professional Electronic Network*, 190 F. Supp. 2 1049 (S.D. Ohio 2002); *Wiggins v. District Cablevision, Inc.*, 853 F. Supp. 484 (D.D.C. 1994); June 9, 1998 letter from William Haynes, Attorney, FTC Division of Credit Practices to Richard LeBlanc; see also *Using Consumer Reports: What Employers Need to Know*, Federal Trade Commission (Mar. 1999), retrieved from <http://www.ftc.gov/bcp/online/pubs/buspubs/credempl.htm>.

<sup>14</sup> 15 U.S.C. § 1681a(d)(2).

<sup>15</sup> *Id.* § 1681a(d)(2).

<sup>16</sup> See *Hodge v. Texaco, Inc.*, 975 F.2d 1093 (5<sup>th</sup> Cir. 1992).

<sup>17</sup> Ann Davis, *Firms Dig Deep Into Workers' Pasts Amid Post-Sept. 11 Security Anxiety*, Wall Street Journal Online (Mar. 12, 2002) (Choicepoint (a CRA) reports it ran over 5 million background checks last year); *Company Finds Plenty of Bogus Info in Job Apps*, Business & Legal Reports (June 12, 2001), retrieved from <http://hr.blr.com/elert.cfm?id=362> (Avert, Inc., an Internet-based CRA, ran over 1.8 million checks in 2000).

initiating the check.<sup>18</sup> The employer must also provide the applicant or employee with a copy of the background check and a summary of his or her rights under FCRA before taking an adverse employment action (*i.e.*, termination, demotion, etc.) based on the check.<sup>19</sup> Following any adverse action, the employer must also provide the individual with the name, address, and phone number of the CRA (including any toll-free telephone number established by a national CRA) and a notice setting forth the individual's right to dispute the accuracy or completeness of any information in the report.<sup>20</sup> The CRA is obligated to reinvestigate the matter free of charge and record the status of the disputed information within 30 days, if the employee or applicant challenges the information in the check.<sup>21</sup>

FCRA also sets certain limits on the information that a CRA may report. Specifically, if the check is done on employees or applicants expected to earn less than \$75,000 a year, FCRA prohibits the CRA from reporting information regarding arrest records, civil suits or judgments, or other adverse information from more than seven years prior to the check or according to the applicable statute of limitations, whichever is longer.<sup>22</sup>

### Discrimination Laws

Federal discrimination laws limit the extent to which an employer may rely on individuals' criminal history when making employment decisions. Specifically, both the Equal Employment Opportunity Commission (EEOC) and federal courts have said that

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<sup>18</sup> 15 U.S.C. § 1681b(b)(2).

<sup>19</sup> *Id.* § 1681b(b)(3).

<sup>20</sup> *Id.* § 1681m(a).

<sup>21</sup> *Id.* § 1681i, note there are exceptions to these rules for checks performed pursuant to national security and on individuals in working in transportation industry. *See Id.* § 1681b(b)(2)-(4).

<sup>22</sup> *Id.* § 1681c(a) & (b).

basing employment decisions on criminal history can have a disproportionate effect on select minorities, and therefore may run afoul of Title VII of the Civil Rights Act of 1964.<sup>23</sup> To avoid problems with Title VII, the employer must show that an individual's criminal history is "job related" and the employment action is "consistent with business necessity."

State discrimination laws are even more restrictive. Indeed, many prohibit employers from even asking candidates about arrest records and impose limitations on employer inquiries into convictions.<sup>24</sup>

In short, both FCRA and federal and state discrimination laws provide ample protection for individuals undergoing background checks and Congress should not be imposing any greater restrictions at a time where employers are facing increased public and governmental pressure to perform such checks. In fact, if you are to enact any changes to FCRA that affect background checks, we recommend you remedy the problems discussed below arising from FCRA's application to background check on contract workers.

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<sup>23</sup> 42 U.S.C. § 2000e *et seq.*; see *Equal Employment Opportunity Commission Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII* (1990) (citing several cases supporting this proposition).

<sup>24</sup> See, e.g., Mass. Gen. Laws ch. 151B § 4(9)(ii). Given protections provided under Federal law (*i.e.* the use of criminal history must be "job related" and "consistent with business necessity"), the Chamber questions the need for these additional state restrictions, particularly to the extent that they prohibit employers from obtaining relevant and important information. A clear example of the problems these state laws can cause was recently reported on by the Washington Post. The article discusses a recent charge against a D.C. high school counselor for the rape of a student. Apparently, in 1996, prior to being hired by the school, the counselor had faced previous rape charges – this time of a 15 year old – but that trial had ended in a hung jury. The school knew of the 1996 charge at the time it hired the employee, but because the charge had not resulted in a conviction, D.C. law prohibited them from using the charge as a basis for refusing to hire the counselor. See Sylvia Moreno and Henri Cauvin, *Counselor Faces Sex Charges*, The Washington Post, (June 5, 2003). As this case demonstrates, and as the EEOC recognizes in their guidance on this issue, information about an employee's arrests can be important to hiring and other employment decisions. See *Equal Employment Opportunity Commission Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII* (1990).

### ***FCRA and Contract Workers***

Employers, particularly those in security sensitive and highly regulated industries, often need to ensure that a background check has been run on contract workers.

However, employers are reluctant to run these checks themselves because doing so could result in the contractors being deemed employees for tax, labor law, or other purposes.

Thus, employers rely on the contractor (the company supplying the contract workers) to run the checks. However, employers may need to see a copy of the background check in order to verify that the contract worker meets certain criteria. This can cause problems with FCRA, if the contractor regularly provides the background checks. In such circumstances, the contractor may be deemed a CRA and have to comply with FCRA's many requirements.

Again, if you do intend to make changes to FCRA beyond reauthorization, we urge that you address this problem.

### **Investigations into Workplace Misconduct**

I am also here to discuss FCRA's impact on employer investigations into workplace misconduct.<sup>25</sup>

Workplace investigations are a critical part of employer efforts to combat harassment, violence, theft, fraud and other threats to the workplace and, in some instances, national security.

On April 5, 1999, the FTC issued a staff opinion, known as "the Vail letter," which has made it significantly more difficult for employers to conduct investigations. The

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<sup>25</sup> Because of the importance of this issue to the Chamber, not only am I testifying here today, but the Chamber also testified on this issue in 2000 and has sent several letters to the FTC requesting it rescind the Vail letter.

letter was issued in response to an inquiry as to whether employers using “outside organizations” to conduct sexual harassment investigations need to comply with FCRA. The letter states that organizations that regularly investigate allegations of workplace sexual harassment, such as private investigators, consultants or law firms, are “consumer reporting agencies” under FCRA, and that if the employer hires such an organization to conduct an investigation, then both the employer and the CRA must comply with FCRA’s notice and disclosure requirements. While the Vail letter only addresses whether FCRA applies to sexual harassment investigations, a subsequent FTC opinion letter states that FCRA applies to any investigation of employee misconduct.<sup>26</sup>

FCRA’s notice and requirements include:

1. notice to the employee of the investigation;
2. the employee’s consent prior to the investigation;
3. a description of the nature and scope of the proposed investigation, if the employee requests it;
4. a release of a full, un-redacted investigative report to the employee;
5. notice to the employee of his or her rights under FCRA prior to taking any adverse employment action; and
6. that the CRA reinvestigate the matter free of charge and record the status of the disputed information within 30 days, if the individual disputes the accuracy or completeness of the information obtained in the investigation.<sup>27</sup>

### ***The Vail Letter Deters Employers from Using Experienced Outside Investigators***

Because it is virtually impossible to conduct an investigation while complying with FCRA’s requirements, and because employers and investigators face unlimited liability, including punitive damages, for failure to comply with any of FCRA’s many technical requirements, the Vail letter effectively deters employers from using

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<sup>26</sup> See August 31, 1999 letter from David Medine, FTC Associate Director Division of Financial Practices, to Susan Meisinger; *see also* Statement of Federal Trade Commission before the House Banking and Financial Services Committee, May 4, 2000.

<sup>27</sup> 15 U.S.C. § 1681 *et seq.*

experienced and objective outside organizations to investigate workplace misconduct.<sup>28</sup>

Yet, in many cases, an employer must do so in order to comply with obligations under other laws. Thus, the Vail letter often places employers in the untenable position of having to choose between two legal obligations.

While the Chamber believes the FTC should rescind the Vail letter because it misconstrues FCRA and conflicts with Congressional intent, the agency has repeatedly refused to do so, claiming a legislative fix is needed.

### The Importance of Outside Investigators

While an employer may avoid running afoul of Vail by performing the investigation itself, there are many instances where a company has no choice but to use an outside investigator. For example, the technical nature of the alleged misconduct may require an expert investigator, such as where the misconduct involves securities fraud. In other instances, such as corporate governance cases, the investigation may involve misconduct by a high-level official and outside objectivity is necessary. In other cases, the employer may simply lack the resources to conduct an in-house investigation.

Even where outside investigators are not necessary, they may be preferred. Indeed, both the courts and administrative agencies have strongly encouraged employers to use experienced outside organizations to investigate suspected workplace violence, employment discrimination and harassment, securities violations, theft or other workplace misconduct.<sup>29</sup> As Assistant Attorney General James K. Robinson said in his

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<sup>28</sup> See May 24, 2000, letter from Howard Price, U.S. Department of Commerce Contracting Officer, to Jane Juliano and June 14, 2000, letter from Jane Juliano to William M. Daley, Secretary of Commerce, both stating that the Department has stopped hiring outside contractors to conduct discrimination investigations. Several Chamber members have informed us they have also been hesitant to use outside investigators due to the Vail letter.

<sup>29</sup> See e.g., *Burlington Industries Inc. v. Ellerth*, 118 S.Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998) (clearly delineating employers obligations under Title VII to investigate all

May 4, 2000 statement to this Committee, “[t]he Department [of Justice] and other agencies often strongly encourage companies, as part of their compliance programs, to retain outside counsel to conduct certain internal investigations, on the theory that an outsider is less subject to retaliation or intimidation by supervisors or co-workers and is less likely to be biased by concerns for the company’s business with existing or future customers.”

The experience of the investigator can also be an issue. For example, according EEOC guidance, “whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.”<sup>30</sup> Few employers have the resources to keep on staff an individual who is well trained in interviewing witnesses and evaluating credibility.

Yet, because of the Vail letter, employers cannot use outside investigators without risking potential unlimited liability under FCRA.

#### Why It is Impossible to Conduct an Effective Investigation and Also Comply With FCRA’s Notice and Disclosure Requirements

According to the Vail letter, FCRA’s disclosure requirements apply to any employment investigation that meets the Act’s definitions and is conducted for a fee by an “outside organization.” As a result, employers have to obtain consent from employees suspected of theft, discrimination, SEC violations and other improprieties before retaining an outside organization to conduct an investigation.

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employee complaints of sexual harassment); EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, 6/21/99 (“An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment [and w]hoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility”).

<sup>30</sup> EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, 6/21/99 (“EEOC Guidance”).

The absurdity of this was recently highlighted in *Rugg v. Hanac*. In that case, a company's former executive director, relying on the Vail letter, sued the board of directors under FCRA for failing to provide her notice and obtain permission before hiring an outside organization to conduct an investigation which lead to her termination. The board of directors launched the investigation after the City of New York expressed concern with the company's finances following a routine audit. While the court expressed reservations about the validity of the Vail letter interpretation, it nonetheless denied the employer's motion to dismiss and ordered more discovery on the issue of whether the outside investigator regularly conducted such investigations, and therefore is a CRA within the meaning of the statute.<sup>31</sup>

As this case demonstrates, Vail creates serious conflicts between a company's responsibilities under FCRA and a board of director's duties to meet its corporate governance obligations, such as those under the Sarbanes-Oxley Act of 2002.<sup>32</sup> Obviously, the board of directors could not inform or obtain consent from the executive director before launching its investigation that might uncover her own financial improprieties. Nor could it ask the executive director to conduct an in-house investigation into such matters.

This case, however, is only one example of the many conflicts between Vail and employers' duties under other laws. Civil rights laws are another example. As then Chairwoman of the EEOC Ida Castro warned in 2000, "the FTC's conclusion that the FCRA's numerous and highly specific requirements control third-party discrimination

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<sup>31</sup> See *Rugg v. Hanac*, 2002 WL 31132883 (S.D.N.Y. 2002); see also *Friend v. Ancillia Systems Inc.*, 68 F. Supp. 2d 969 (N.D. Ill. 1999).

<sup>32</sup> Pub. L. No. 107-204.

investigations has serious unintended consequences for the enforcement of civil rights laws.”<sup>33</sup>

Simply put, employers cannot both adhere to FCRA’s disclosure and consent requirements and comply effectively with their obligations under federal anti-discrimination laws.

In two 1998 cases, *Burlington Industries, Inc. v. Ellerth*, and *Faragher v. City of Boca Raton*, the Supreme Court delineated employers’ obligations under Title VII of the Civil Rights Act of 1964<sup>34</sup> to investigate thoroughly all employee complaints of sexual harassment<sup>35</sup> and to take reasonable care to prevent and promptly correct harassment.<sup>36</sup>

An employer who fails to meet these obligations can be found liable for a rogue supervisor’s actions and greatly increase the likelihood it will be assessed punitive damages.<sup>37</sup>

Following these decisions, the EEOC issued comprehensive policy guidance, explaining the circumstances under which employers can be held liable for unlawful harassment by supervisors.<sup>38</sup> The guidance, which does not limit its scope to “sexual harassment,” but covers all forms of harassment in the workplace, addresses the steps employers should take to prevent and correct harassment. It states that an anti-harassment policy and complaint procedure should contain, among other things,

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<sup>33</sup> Statement of Ida L. Castro before the Committee on Banking and Financial Services, May 4, 2000.

<sup>34</sup> 42 U.S.C. § 2000e *et seq.*

<sup>35</sup> Although *Burlington* and *Faragher* involved claims of sexual harassment, many courts have extended the holdings to allegations of race and other forms of discrimination.

<sup>36</sup> *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998). These cases dealt with employer liability for a supervisor’s actions. Although the standard for assessing liability against an employer for supervisor’s actions differs slightly from that of when harassment was done by co-workers, the end result is the same. Again, for the reasons mentioned above, an employer is best served by using experienced and objective outside investigators.

<sup>37</sup> See *Kolstad v. American Dental Association*, 527 U.S. 526 (1999).

<sup>38</sup> See, EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, 6/21/99 (“EEOC Guidance”).

assurances that employees complaining of harassment and other witnesses will be protected against retaliation; the employer will protect the confidentiality of harassment complaints and records relating to such complaints to the extent possible; the employer will conduct a prompt, thorough, and impartial investigation; and the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.<sup>39</sup>

Clearly, an employer cannot both comply with FCRA's disclosure requirements and the guidelines. Indeed, an employer could be thwarted from performing the investigation altogether if the employee exercised his or her rights under FCRA to withhold consent. Also, advance notice of misconduct investigations could result in destruction of incriminating evidence. Other problems can arise due to FCRA's disclosure requirements. For example, few witnesses would come forward if they knew their testimony would be readily released to the accused harasser.

In short, an employer simply cannot meet its Title VII obligations while complying with FCRA.

In addition to Title VII, Vail thwarts employers' ability to comply with other numerous federal and state laws. For example, under the securities laws, broker-dealers have a statutory obligation to pursue allegations of wrongdoing by their employees and are monitored by self-regulating organizations. Among other things, broker-dealers conduct surprise internal audits and branch office compliance examinations to meet their statutory supervisory obligations. Often, outside consultants are used for these investigations. Moreover, in cases of suspected fraud, it is standard practice for issuers and broker-dealers to hire a law firm to conduct internal investigations. All the problems

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<sup>39</sup> *Id.*

discussed above with regard to discrimination investigations are equally applicable to securities investigations.

Similarly, the laws regulating health and safety in the workplace require employers to provide a safe workplace and to investigate potential hazards including exposure to workplace violence. The Federal Drug-Free Workplace Act also imposes a duty on employers to investigate and eliminate drug use in the workplace.

Indeed the list of required employment related investigations is seemingly endless.

### Vail Misconstrues FCRA

It is also clear that Vail misconstrues FCRA. There is no evidence in FCRA's text or legislative history that it was intended to apply to investigations of employee misconduct. The title of the statute – The Fair Credit Reporting Act - as well as the first few sentences of the Act are particularly telling on this point. Specifically, FCRA states that Congress found that “the banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence in the banking system.”<sup>40</sup> Clearly, the legislation was enacted to address the effect of inaccurate credit reports on the banking system and the financial well-being of consumers, rather than employee privacy rights in the face of investigations into specific acts of workplace misconduct. As Committee Chair Oxley and Subcommittee Chair Bachus aptly stated, “Congress did not craft the FCRA to apply to [employment investigations].”<sup>41</sup>

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<sup>40</sup> 15 U.S.C. Section 1681(a)(1).

<sup>41</sup> See also *Hartman*, 158 F.Supp.2d at 876 (“There is nothing in the FCRA or its history that indicates that Congress intended to abrogate the attorney-client or work-product privileges, as would be the effect of

In addition, most courts that have specifically considered the letter have either rejected it or seriously questioned its reasoning.<sup>42</sup> As one court put it, the letter “appears to have drawn a false analogy between employment decisions by a present or prospective employer based on information about a consumer’s *general status* (such as credit, criminal or family history and the like) and a decision by a present employer about the consumer’s *particular workplace conduct* (such as threats of violence).”<sup>43</sup>

While the FTC has acknowledged the problem caused by the Vail letter,<sup>44</sup> it nonetheless has refused to reverse its position, claiming, even as recently as a few weeks ago, that a legislative fix is necessary.<sup>45</sup>

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applying the FCRA’s requirements (which include disclosure of the report) to reports of the type at issue in this case”).

<sup>42</sup> See *Rugg v. Hanac*, 2002 WL 31132883 (S.D.N.Y. 2002); *Hartman v. Lyle Park District*, 158 F.Supp.2d 869, 876 (N.D. Ill. 2001); *Johnson v. Federal Express Corp.*, 147 F.Supp.2d 1268, 1272 (M.D. Ala. 2001); *Robinson v. Time Warner, Inc.*, 187 F.R.D. 144; 1999 U.S. Dist. LEXIS 14304 at 14 n.2 (S.D.N.Y. 1999).

<sup>43</sup> *Johnson*, 147 F.Supp.2d at 1272.

<sup>44</sup> In the Statement of Federal Trade Commission Before the House Banking and Financial Services Committee Subcommittee on Financial Institutions and Consumer Credit (May 4, 2000), the Commission said:

The Commission fully appreciates that practical problems may arise in applying all FCRA requirements to investigations by third parties of workplace misconduct. The Commission agrees that there is considerable tension between some of the affirmative requirements that . . . FCRA impose[s] on employers and certain public policy aims of statutes and regulations that, directly or indirectly, compel or encourage investigations of various forms of workplace misconduct. Most notably these include the FCRA requirement that an employer obtain an employee’s written authorization before preparing a consumer report, which arguably provides an antagonistic employee the opportunity to thwart a third-party investigation by withholding authorization. We understand this is especially troubling for small employers (who may not have the personnel or expertise to conduct an “in-house” investigation, and any employer who wishes to put a workplace investigation in the hands of an outside entity in order to foster a greater sense of impartiality.

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Additionally...[b]y alerting the employee to the investigation, it may permit a dishonest employee to destroy or alter evidence, seek to influence potential witnesses, and otherwise impair the reliability of the investigation. The requirements that the employee be provided a copy of the report and that, upon request, “all information” in the consumer reporting agency’s file on the employee be disclosed to the employee likewise pose difficulties for thorough investigations. They may have a “chilling effect” on the willingness of *others* (co-workers, witnesses) to participate in the investigation, for they fear retribution or other adverse consequences if their identity is divulged or if sufficient information is available to infer the individuals who gave evidence.”

### Legislative Fix

Rep. Pete Sessions (R-TX) has introduced H.R. 1543, the Civil Rights and Employee Investigation Clarification Act, which would exempt certain workplace misconduct investigations from FCRA's notice and disclosure requirements. The bill would require, however, that the employer provide the subject of the investigation with a summary of the report, if it takes any adverse action based on the investigation. H.R. 1543 has bi-partisan support and its cosponsors include members of this Subcommittee as well as other members of the full Committee, including Ranking Member Barney Frank.

While the Chamber favors a complete exemption, it realizes that it is often hard to put the genie back in the bottle, and that H.R. 1543 represents a concerted effort on the part of the cosponsors to reach a reasonable compromise between competing interests. We commend them for this effort and urge that this Subcommittee support H.R. 1543.

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<sup>45</sup> See Prepared Statement of the Federal Trade Commission of the Fair Credit Reporting Act Before the Financial Institutions and Consumer Credit, at 17 n. 48 (June 4, 2003).

<b>Bill #</b>	<b>Title/Description</b>	<b>Sponsor</b>
H.R. 439	Domestic Consumer Safety Act of 2003: To create a system of background checks for certain workers who enter people's homes, and for other purposes.	Andrews (D-NJ)
H.R. 1855	To amend title XVIII of the Social Security Act to require home health agencies participating in the Medicare Program to conduct criminal background checks for all applicants for employment as patient care providers.	Andrews (D-NJ)
H.R. 364	To amend title XIX of the Social Security Act to require criminal background checks on drivers providing Medicaid medical assistance transportation services.	Hooley (D-OR)
S. 769	Private Security Officer Employment Authorization Act of 2003: To permit reviews of criminal records of applicants for private security officer employment.	Levin (D-MI)
S. 958	To amend titles XVIII and XIX of the Social Security Act to prevent abuse of recipients of long-term care services under the Medicare and Medicaid programs.	Kohl (D-WI)
H.R. 2144	To amend title 49, United States Code, to make technical corrections and improvements relating to aviation security, and for other purposes.	Young (R-AK)
H.R. 208	To amend the Social Security Act with respect to the employment of persons with criminal backgrounds by long-term care providers.	Thompson (D-CA)

S. 333	To promote elder justice, and for other purposes.	Breaux (D-LA)
H.R. 18	To amend title XVIII of the Social Security Act to establish additional provisions to combat waste, fraud, and abuse within the Medicare Program, and for other purposes.	Biggert (R-IL)
S. 885	Entitled 'Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003'.	Kennedy (D-MA)
S. 131	To amend the Atomic Energy Act of 1954 and the Energy Reorganization Act of 1974 to strengthen security at sensitive nuclear facilities.	Reid (D-NV)
S. 228	To amend title 18, United States Code, to limit the misuse of social security numbers, to establish criminal penalties for such misuse, and for other purposes.	Feinstein (D-CA)
H.R. 637	To amend title 18, United States Code, to limit the misuse of Social Security numbers, to establish criminal penalties for such misuse, and for other purposes.	Sweeney (R-NY)
S. 745	To require the consent of an individual prior to the sale and marketing of such individual's personally identifiable information, and for other purposes.	Feinstein (D-CA)
S. 6	To enhance homeland security and for other purposes.	Daschle (D-SD)
H.R. 1407	To amend title 40, United States Code, to enhance security at executive and judicial branch facilities by	Sessions (R-TX)

	requiring locksmiths who provide locksmith services at such a facility to be credentialed, which includes undergoing a criminal history background check.	
S. 151	To amend title 18, United States Code, with respect to the sexual exploitation of children.	Hatch (R-UT)
H.R. 2145	To condition the minimum-wage-exempt status of organized camps under the Fair Labor Standards Act of 1938 on compliance with certain safety standards, and for other purposes.	Andrews (D-NJ)
S. 157	To help protect the public against the threat of chemical attacks.	Corzine (D-NJ)
S. 1043	To increase security at nuclear power plants – Improve employee background checks under Section 149 of Atomic Energy Act of 1954.	Inhofe (R-OK)
H.R. 2193	To improve port security including background checks	Ose (R-CA)